

CAUSE NO. 03-20-00129-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

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JEFFREY D. KYLE
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Qatar Foundation for Education, Science, and Community Development,
Appellant

v.

Zachor Legal Institute,
Appellee.

On Appeal from the 200th District Court of Travis County, Texas
The Honorable Judge Karin Crump, Presiding

BRIEF OF REAL PARTY IN INTEREST KEN PAXTON

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil
Litigation

CRAIG J. PRITZLAFF
Chief, Administrative Law Division

August 31, 2020

KIMBERLY FUCHS
State Bar No. 24044140
Assistant Attorney General
Administrative Law Division
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4195
Facsimile: (512) 320-0167

ATTORNEYS FOR KEN PAXTON,
ATTORNEY GENERAL OF TEXAS

Oral Argument Not Requested

REFERENCES TO THE PARTIES

Appellant Qatar Foundation for Education, Science and Community Development will be referred to as “QF.” Appellee Zachor Legal Institute will be referred to as “Zachor Institute” or “Zachor.” Real Party in Interest Texas Attorney General Ken Paxton will be referred to as “the Attorney General.”

REFERENCES TO THE RECORD

Clerk’s record will be referenced as: CR [Page]

Appendix will be referenced as: App. [Letter]

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STATEMENT REGARDING ORAL ARGUMENT

The Attorney General does not request oral argument in this appeal, as the issues before the Court concern settled questions of law. However, the Attorney General would like the opportunity to present oral argument if the Court otherwise determines that oral argument is necessary to help clarify the issues before the Court.

ISSUE(S) PRESENTED

1. Does the Public Information Act (PIA) provide jurisdiction for a private party whose information is subject to release pursuant to a PIA request to file suit to challenge an Attorney General letter ruling?

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BRIEF OF REAL PARTY IN INTEREST KEN PAXTON

TO THE HONORABLE JUSTICES OF THE THIRD COURT OF APPEALS:

INTRODUCTION

The Public Information Act (PIA) creates a framework through which determinations must be made about the confidentiality or availability of information held by a governmental body. While the Attorney General makes an initial determination on this issue, the PIA provides a process for a party who disagrees with that determination to bring the issue to district court.

Although requestors seeking to gain access to information and parties wishing to withhold information have causes of action available, the PIA provides an avenue to those directly affected by a letter ruling to secure a district court ruling on the

availability or confidentiality of information. Despite Zachor Institute’s position and the District Court’s ruling, this right to pursue judicial relief includes private parties whose information is being held by a governmental body. The Supreme Court and the statute itself both support this position.

STANDARD OF REVIEW

The Court reviews a ruling on subject-matter jurisdiction de novo. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

SUMMARY OF THE ARGUMENT

The PIA provides jurisdiction for a private party to file suit to challenge an Attorney General letter ruling. Section 552.325 states that a governmental body, officer for public information, or other person or entity may file suit to withhold information. Tex. Gov’t Code § 552.325. Because the phrase “other person or entity” must include someone other than a governmental body for that phrase to have meaning, “other person or entity” must be interpreted to include private parties whose information is subject to release. A requestor cannot be the “other person or entity” referenced, as a requestor would not be seeking to withhold information.

The Supreme Court, in *Boeing*, addressed whether a private party has standing to bring suit to challenge an Attorney General letter ruling. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 833 (Tex. 2015). The Supreme Court confirmed that such standing

is conferred by the PIA. *Id.* The Supreme Court precedent must be followed, and the trial court's ruling must be reversed.

ARGUMENT

I. The PIA provides jurisdiction for a private party, whose information is subject to release pursuant to a PIA request, to file suit to challenge an Attorney General letter ruling.

A. PIA section 552.325 provides jurisdiction for a private party to file suit.

Despite the language of PIA section 552.325, Zachor argued in the lower court, “[n]o provision of the PIA authorizes a third party that asserts a privacy or property interest to file a lawsuit to challenge a decision of the Attorney General.” CR 462. This statement is not supported by either the statutory text or Supreme Court precedent interpreting it.

Sections 552.324 and 552.325 of the PIA authorize parties to file suit against the Attorney General to challenge a letter ruling. Tex. Gov’t Code §§ 552.324, .325. While section 552.324 applies solely to a governmental body, section 552.325 contains no such limitation and expressly authorizes suits by private parties.

Section 552.325 is entitled: PARTIES TO SUIT SEEKING TO WITHHOLD INFORMATION. Tex. Gov’t Code § 552.325. This section uses the term “parties,” rather than the term “governmental bodies.” *Id.* Because the term “governmental body” is used in section 552.324, *see* App. C, the use of “parties” demonstrates the

Legislature’s intention that section 552.325 apply to a broader group of litigants than the immediately preceding section does.

The text of section 552.325 further supports an expansive reading of the term “parties.” That section reads, “[a] governmental body, officer for public information, *or other person or entity* that files a suit seeking to withhold information” Tex. Gov’t Code § 552.325 (emphasis added). “Governmental body” and “officer for public information” are both explicitly listed; therefore, in order for the phrase “or other person or entity” to have meaning, private parties whose information has been requested, such as QF, must have standing to bring suit. Rules of statutory construction require a presumption that every word or phrase in a statute was included for a purpose. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981). Therefore, this Court must presume that the inclusion of “person or entity” in section 552.325 shows the Legislature’s intent *not* to limit standing for PIA lawsuits to governmental bodies.

In its reply supporting its plea in the lower court, Zachor Institute implies that the term “parties” refers to the requestor. CR 462. That interpretation is not supported by the language of the statute. First, section 552.325(a) does not give a requestor the ability to file suit under that section. That section is titled “Parties to suit seeking to withhold information.” Tex. Gov’t Code § 552.325(a). It is difficult

to imagine a situation in which a requestor would be “seeking to withhold information.”

Additionally, the reference to “other person or entity” in section 552.325(a) is followed by the phrase “*that files a suit seeking to withhold information from a requestor.*” *Id.* The “other person or entity” cannot be the requestor since a requestor would not be seeking to withhold information from itself. Zachor Institute has not suggested what “other person or entity” may be permitted, or even interested in filing suit. For the phrase “other person or entity” to have meaning, it must be read to include private parties whose information is at issue.

Although a requestor is entitled to intervene in a section 552.325 suit, this section does not create jurisdiction for a requestor to file suit to seek the release of information. But a requestor who disagrees with the Attorney General’s determination that information can be withheld is not without remedy. A requestor may file a writ of mandamus against a governmental body that refuses to supply information. Tex. Gov’t Code § 552.321, App. B. Although the Attorney General is not a party to such a suit, a requestor can bring such a suit even if the Attorney General has not yet issued a letter ruling or has held that the information need not be released. *Kallinen v. City of Houston*, 462 S.W.3d 25, 28–29 (Tex. 2015).

B. Zachor Institute’s standing argument has been foreclosed by the Supreme Court in *Boeing*.

Even if the statute were ambiguous regarding a third party’s ability to bring suit to challenge a letter ruling, Zachor Institute’s argument has been addressed and rejected by the Supreme Court. In *Boeing*, the Attorney General argued that a third party did not have standing to assert section 552.104 of the PIA. *Boeing Co.*, 466 S.W.3d at 833. The Supreme Court, however, looked to the text and found no such limitation, holding that Boeing could assert section 552.104 to withhold its information. *Id.*; see Tex. Gov’t Code § 552.104, App. A.

While Zachor argues, correctly, that the issue of private party standing was not squarely at issue in *Boeing*, the Court in that case presumed that standing existed. The Court framed the issue as “whether Boeing has the right under the Act to assert its own interests in protecting [its] information.” *Id.* at 837. The Court then held that it does, stating, “Boeing has the right to protect its own privacy and property interest through the judicial remedy section 552.325 provides.” *Id.* at 842. This unambiguous statement is a recognition that section 552.325 provides a remedy for third parties like Qatar Foundation to bring suit under section 552.325.

Zachor further argues that if Qatar Foundation could bring a suit, it would only be valid if it also sued Texas A&M. CR 463. However, Zachor provides no support for this position, and neither the statute nor the case law makes such a distinction.

The Supreme Court's opinion in *Boeing* precludes the argument made by Zachor, and this Court should deny the plea to the jurisdiction.

CONCLUSION AND PRAYER

The Attorney General asks this Court to reverse the trial court's grant of Zachor Institute's plea to the jurisdiction and remand the case to the trial court for disposition on the merits.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil
Litigation

CRAIG J. PRITZLAFF
Chief, Administrative Law Division

/s/ Kimberly Fuchs
KIMBERLY FUCHS
State Bar No. 24044140
Assistant Attorney General
Administrative Law Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711
Telephone: (512) 475-4195
Facsimile: (512) 320-0167

kimberly.fuchs@oag.texas.gov
***Attorneys for Ken Paxton, Attorney
General of Texas***

CERTIFICATE OF COMPLIANCE

I certify that the Brief of Ken Paxton, Attorney General of Texas, complies with Rule 9 of the Texas Rules of Appellate Procedure and the word count of this document is 1,394. The word processing software used to prepare this filing and calculate the word count of the document is Microsoft Word 2016.

Date: August 31, 2020

/s/ Kimberly Fuchs
KIMBERLY FUCHS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Brief of Ken Paxton, Attorney General of Texas, has been served on August 31, 2020, on the following attorneys-in-charge via e-service and/or e-mail:

D. Patrick Long
State Bar No. 12515500
pat.long@squirepb.com
Amanda D. Price
State Bar No. 24060935
amanda.price@squirepb.com
Squire Patton Boggs, LLP
2000 McKinney Ave., Suite 1700
Dallas, Texas 75201
Telephone: (214) 758-1500
Facsimile: (214) 758-1550
*Attorneys for Qatar Foundation for
Education, Science and Community
Development*

Jennifer S. Riggs
State Bar No. 16922300
Riggs & Ray, P.C.
506 West 14th Street, Suite A
Austin, Texas 78701
Telephone: (512) 457-9806
Facsimile: (512) 457-9066
jriggs@r-alaw.com
Attorney for Zachor Legal Institute

/s/ Kimberly Fuchs
KIMBERLY FUCHS
*Attorney for Texas Attorney General
Ken Paxton*

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APPENDIX A

Tex. Gov't Code
§ 552.104

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 5. Open Government; Ethics (Refs & Annos)
Subtitle A. Open Government
Chapter 552. Public Information (Refs & Annos)
Subchapter C. Information Excepted from Required Disclosure

V.T.C.A., Government Code § 552.104

§ 552.104. Exception: Information Related to Competition or Bidding

Effective: January 1, 2020
Currentness

(a) Information is excepted from the requirements of Section 552.021 if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.

(b) Except as provided by Subsection (c), the requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under this section.

(c) Subsection (b) does not apply to information described by Section 552.022(a) relating to the receipt or expenditure of public or other funds by a governmental body for a parade, concert, or other entertainment event paid for in whole or part with public funds. A person, including a governmental body, may not include a provision in a contract related to an event described by this subsection that prohibits or would otherwise prevent the disclosure of information described by this subsection. A contract provision that violates this subsection is void.

Credits

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 2001, 77th Leg., ch. 1272, § 7.01, eff. June 15, 2001; Acts 2019, 86th Leg., ch. 45 (H.B. 81), § 1, eff. May 17, 2019; Acts 2019, 86th Leg., ch. 1216 (S.B. 943), § 3, eff. Jan. 1, 2020.

V. T. C. A., Government Code § 552.104, TX GOVT § 552.104
Current through the end of the 2019 Regular Session of the 86th Legislature

APPENDIX B

Tex. Gov't Code
§ 552.321

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 5. Open Government; Ethics (Refs & Annos)
Subtitle A. Open Government
Chapter 552. Public Information (Refs & Annos)
Subchapter H. Civil Enforcement

V.T.C.A., Government Code § 552.321

§ 552.321. Suit for Writ of Mandamus

Effective: January 1, 2020
Currentness

(a) A requestor or the attorney general may file suit for a writ of mandamus compelling a governmental body to make information available for public inspection if the governmental body refuses to request an attorney general's decision as provided by Subchapter G¹ or refuses to supply public information or information that the attorney general has determined is public information that is not excepted from disclosure under Subchapter C.²

(b) A suit filed by a requestor under this section must be filed in a district court for the county in which the main offices of the governmental body are located. A suit filed by the attorney general under this section must be filed in a district court of Travis County, except that a suit against a municipality with a population of 100,000 or less must be filed in a district court for the county in which the main offices of the municipality are located.

(c) A requestor may file suit for a writ of mandamus compelling a governmental body or an entity to comply with the requirements of Subchapter J.

Credits

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 1035, § 24, eff. Sept. 1, 1995; Acts 1999, 76th Leg., ch. 1319, § 27, eff. Sept. 1, 1999; Acts 2019, 86th Leg., ch. 1216 (S.B. 943), § 8, eff. Jan. 1, 2020.

Footnotes

¹ V.T.C.A., Government Code § 552.301 et seq.

² V.T.C.A., Government Code § 552.101 et seq.

V. T. C. A., Government Code § 552.321, TX GOVT § 552.321

Current through the end of the 2019 Regular Session of the 86th Legislature

APPENDIX C

Tex. Gov't Code
§ 552.324

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 5. Open Government; Ethics (Refs & Annos)
Subtitle A. Open Government
Chapter 552. Public Information (Refs & Annos)
Subchapter H. Civil Enforcement

V.T.C.A., Government Code § 552.324

§ 552.324. Suit by Governmental Body

Effective: September 1, 2009
Currentness

(a) The only suit a governmental body may file seeking to withhold information from a requestor is a suit that:

(1) is filed in a Travis County district court against the attorney general in accordance with Section 552.325; and

(2) seeks declaratory relief from compliance with a decision by the attorney general issued under Subchapter G.¹

(b) The governmental body must bring the suit not later than the 30th calendar day after the date the governmental body receives the decision of the attorney general determining that the requested information must be disclosed to the requestor. If the governmental body does not bring suit within that period, the governmental body shall comply with the decision of the attorney general. If a governmental body wishes to preserve an affirmative defense for its officer for public information as provided in Section 552.353(b)(3), suit must be filed within the deadline provided in Section 552.353(b)(3).

Credits

Added by Acts 1995, 74th Leg., ch. 1035, § 24, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 1319, § 30, eff. Sept. 1, 1999; Acts 2009, 81st Leg., ch. 1377, § 10, eff. Sept. 1, 2009.

Footnotes

¹ V.T.C.A., Government Code § 552.301 et seq.
V. T. C. A., Government Code § 552.324, TX GOVT § 552.324
Current through the end of the 2019 Regular Session of the 86th Legislature

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Sharon Murray on behalf of Kimberly Fuchs
Bar No. 24044140
sharon.murray@oag.texas.gov
Envelope ID: 45827932
Status as of 8/31/2020 11:41 AM CST

Associated Case Party: Qatar Foundation for Education, Science and Community Development

Name	BarNumber	Email	TimestampSubmitted	Status
Amanda DoddsPrice		amanda.price@squirepb.com	8/31/2020 11:21:47 AM	SENT
Anna M.Baker		abaker@adjtlaw.com	8/31/2020 11:21:47 AM	SENT
David P. Long	12515500	patrick.long@squirepb.com	8/31/2020 11:21:47 AM	SENT
Wallace B.Jefferson		wjefferson@adjtlaw.com	8/31/2020 11:21:47 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Nancy Villarreal		Nancy.Villarreal@oag.texas.gov	8/31/2020 11:21:47 AM	SENT
Sharon Murray		Sharon.Murray@oag.texas.gov	8/31/2020 11:21:47 AM	SENT

Associated Case Party: Ken Paxton, Texas Attorney General

Name	BarNumber	Email	TimestampSubmitted	Status
Kimberly L. Fuchs	24044140	Kimberly.Fuchs@oag.texas.gov	8/31/2020 11:21:47 AM	SENT

Associated Case Party: Zachor Legal Institute

Name	BarNumber	Email	TimestampSubmitted	Status
Jennifer Scott Riggs	16922300	jriggs@r-alaw.com	8/31/2020 11:21:47 AM	SENT